

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-191544

DATE: September 7, 1978

MATTER OF: Aero Products Research, Inc.

DIGEST:

1. Waiver of first article testing requirement for contractor whose product was tested and approved under prior contract, which was terminated for convenience prior to delivery, is not arbitrary where approval occurred within one month of subject solicitation's issuance and record does not show that termination was caused by deficiencies in tested product.
2. Failure to grant waiver of first article testing requirement for contractor whose previously supplied products had been delivered under contracts where specification deviation was granted is not arbitrary where agency determines that deviation is not appropriate for subject procurement.
3. Contention that offer was unacceptable because it contained only price for item without first article testing when RFP required prices both with and without testing is without merit where agency indicates that offer did contain both prices but contracting officer crossed out first article price when it was determined that award would be based on first article waiver.
4. Where award was made in accordance with discount offered in proposal fact that notice of award supplied to protester misstated discount terms does not affect award.

Aero Products Research, Inc. (Aero) protests the award of a contract under Request for Proposals (RFP) No. F34601-78-R-1183 to General Aero Products Corp. (General) by the Department of the Air Force, Oklahoma City Air Logistics Center. The solicitation, a total small business set-aside, was sent to Aero and General as the only two known small business sources of the 5128 CPU-26A/P Navigation Computer. The solicitation requested quotations for item 0001AB (with first article testing) and item 0001AC (first article testing not required). For evaluation purposes, the RFP indicated that the estimated cost to the Government for first article testing was \$100.

Aero responded by submitting a proposal with unit prices of \$5.11 for item 0001AB and \$4.88 for item 0001AC with a 1/10 percent discount for payment within 20 days. General submitted its proposal for \$4.89 for both items with a 1/2 percent discount for payment within 20 days.

In evaluating the proposals, the agency determined that first article testing should not be waived for Aero and should be waived for General. Since General's price for item 0001AC was less than Aero's price for item 0001AB, including first article testing, award was made to General.

Aero's protest as initially submitted was based on the contentions that (1) General was not the lowest offeror on item 0001AC, (2) General does not qualify for first article testing, and (3) Aero does qualify for such a waiver. After reviewing the report submitted by the agency in connection with the protest, Aero further contends that General's offer should have been rejected as unacceptable as it does not contain a price for item 0001AB as required by the RFP and notes a disparity between the discount rate indicated in the notice of award it received and that actually offered by General.

For reasons discussed below, the protest is denied.

The central issue raised is the propriety of the Air Force's granting General a waiver of the first

article testing requirement and the agency's refusal to grant Aero a similar waiver.

The decision to waive first article testing for a particular offeror is essentially an administrative one which we will not disturb unless it is clearly arbitrary and capricious. Libby Welding Company, B-186395, February 25, 1977, 77-1 CPD 139. We believe that the record sustains the agency's determination in granting a waiver to General and denying one to Aero.

The Air Force granted the waiver to General based on a first article test conducted on General's computer in connection with Contract F34601-77-C-2400. However, that contract was terminated for convenience before any items were delivered under it. It appears from the record that the first article was approved by January 10, 1978 while the contract was terminated on January 11.

Aero argues that in view of the termination of General's contract, there never was a valid first article test. Aero notes that the contracting officer did not notify General of the approval of its first article until January 29, after the contract was terminated.

The solicitation provides at paragraph C-66 that first article test requirements will be waived if the contract is awarded to a contractor who is currently in production or has previously satisfactorily furnished an identical or similar item under a Government contract or subcontract. Taken literally, the provision predicates waiver of first article approval not on prior first article tests but on prior acceptance by the Government of the same or similar items. Mars Signal Light Company, B-189176, November 3, 1977, 77-2 CPD 342. However, we believe that the discretion granted the agency in this area is broad enough to permit a waiver in a case such as the instant one where an identical item has passed a first article test less than one month prior to the issuance of the subject solicitation and there is nothing in the record to indicate that the termination of the contract under

which the test was conducted was related to deficiencies in the tested product. Although Aero attempts to cast doubt on the credibility of the testing of General's item by submitting documentation which allegedly indicates that the material used in General's computer was approved either as early as 1975 or for a prior contract we find no basis to question the results of the agency's test.

Aero contends that it should have been granted a waiver of the first article testing requirement because by letter dated June 5, 1975, it had received first article approval under contract F 34601-75-D-0341. However, that letter indicates that approval was subject to the correction of deficiencies and the grant of a deviation from the specifications permitting, on a one-time basis, the use of "half-hard" aluminum. The record before us shows that although Aero has previously supplied the computer to the Air Force, in each instance it requested and was granted a deviation from the specifications. We are aware of no contract under which Aero (unlike General) received first article approval based upon the full specifications, without deviations.

In the instant procurement, the Air Force insists upon full compliance with the specifications, in view of the increased rate at which these items, which had been accepted under prior contracts where deviations had been granted have been wearing out. While Aero maintains that the increased rate of issue may be attributable to other causes, we have no reason to question the Air Force's purpose nor do we believe that the agency is under any obligation to continue granting Aero deviations from the specifications.

Thus the record clearly demonstrates that Aero has not received an unqualified approval for production of the subject computers. We do not believe such approval, which is limited to instances where a deviation must be granted, can be considered a general approval which would necessarily give rise to a waiver of first article testing. Further, the fact that the agency has determined that the previously granted deviation contributed to the increased usage rate of these items prevents these previously accepted items from qualifying as "similar" items whose prior acceptance may have entitled Aero to a waiver of first article testing under the terms of the instant solicitation.

Accordingly, the contracting officer was clearly within his right in not waiving first article testing for Aero. Libby Welding Company, Inc., supra.

Regarding Aero's contention that the award was not made in accordance with General's offer, we note that its proposal offered a discount of 1/2 percent 20 days, net 30 days. The proposal was evaluated and award was made on that basis. The notice of the award erroneously contained the notation under the column "DISCOUNT" "Net 30 days". However, the record indicates that notwithstanding the notice of award, the offer was evaluated and award made, in accordance with the terms of the proposal, i.e., discount to the Government of 1/2 percent if paid in 20 days and net for payment in 30 days. Thus, we find no merit in Aero's contention concerning the discount.

Aero contends that as the solicitation required a response to both items, 0001AB and 0001AC, General's offer for only 0001AC was unacceptable.

Aero's argument is based on the fact that on the copy of General's proposal that Aero received as a part of the agency's protest report, it appears that General's offer for item 0001AB (with first article testing) was lined out.

We have been advised that the original proposal submitted by General had a response for both items 0001AB and 0001AC. The agency reports that the contracting officer crossed out item 0001AB at the time of award when he determined first article testing would be waived for General. This is substantiated by the abstract of offers which included a price for both items for General. General did offer on all items as required by the solicitation. In any event, since award was made on the basis of a waiver of first article testing, even if the first article price was omitted, it would not affect the award.


Finally, Aero notes that the Air Force in its report on this matter stated that if an evaluation of price only for item 0001AC had been made, Aero would have been the low offeror. This would be true only if Aero was being evaluated for item 0001AC. However, to be considered for Item 0001AC, Aero must have had first article approval. As discussed above, we believe the Air Force was correct in determining that Aero did

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not have first article approval and could not be evaluated for item 0001AC. Aero could thus only be evaluated for item 0001AB. Aero was not the lowest offeror since its price for Item 0001AB was higher than General's price for Item 0001AC. Accordingly, its contention that award was not made to the lowest acceptable offeror is without merit.

The protest is denied.


Deputy Comptroller General
of the United States